BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2003-01: SAGEBRUSH POWER PARTNERS, LLC; KITTITAS VALLEY WIND POWER PROJECT	EXHIBIT 41 R SUP (RW-R SUP)

APPLICANT'S PREFILED SUPPLEMENTAL DIRECT TESTIMONY
WITNESS # 22: ROGER WAGONER

Q Please state your name and business address.

A My name is Roger Wagoner and my business address is BHC Consultants, LLC., 720 Third Avenue, Suite 1200, Seattle, Washington 98104. At the time I submitted prior testimony in this matter, my business name was Berryman & Henigar.

Q Have you previously filed prepared testimony in this matter?

A Yes

Q Is this testimony given to supplement your prior testimony?

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A Yes

Q Have your occupation and profession and/or duties as a professional changed since you submitted your previous testimony?

A Yes, somewhat. I am now the Director of Community Planning for the Seattle office of BHC Consultants, LLC a professional planning and engineering consulting firm. In addition to the experience outlined in my prior testimony, I have consulted in assessing and/or written development regulations for Walla Walla County, College Place, Orting, Bainbridge Island, Seattle, and Sultan. I supervise a staff of four professional planners currently preparing shoreline master programs, critical area ordinances, and permit procedures for jurisdictions including Milton, Darrington, Sultan, Skykomish, Gold Bar, and Lake Forest Park as well as providing "current" planning services to a number of jurisdictions in which we review land use permit applications in place of, or as adjuncts to local staff. I am leading a task force of the Washington Chapter APA that has established a Community Planning Assistance Program, providing pro bono professional consultation to rural and disadvantaged communities in need of planning problem solving services.

Q Would you please identify what has been marked for identification as Exhibit 41-2 (RW-2)

A Exhibit 41-2 (RW-2) is my current résumé of my educational background and employment experience. This résumé replaces the résumé submitted with my previous testimony.

Q. What is the specific purpose of this supplement to your prior testimony?

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A In 2005, Horizon Wind Energy (formerly Zilkha Renewable Energy) redesigned the Kittitas Valley Wind Power project layout to respond to comments on project visual aspects, aesthetics, and lighting raised by the Kittitas County Commissioners, County staff, adjacent landowners, and the general public. In the Fall of 2005, Horizon submitted applications to Kittitas County to seek local approval of the project. After hearings extending from January into June, 2006, the Kittitas County Board of County Commissioners denied the project. I have reviewed the complete Second Request for Preemption, including all transcripts of the County hearings and proceedings. I am supplementing my prior testimony to share my opinions regarding the County's 2005-06 process and decision-making.

Q Having reviewed the County's hearing transcript and decision documents, do you have an opinion regarding the County's application of its process, mixing comprehensive plan amendments and permitting-siting processes?

A Yes. In my previous testimony, I described my opinion that the objective of subarea planning is to fine-tune the comprehensive plan (and possibly the development code) to address specific physical features of the area; engage the stakeholders with specific interests in the area; formulate alternative approaches to resolving the issues or to achieving the vision; and ensure that the preferred alternative is consistent with the overall goals and objectives of the Comprehensive Plan. Typically, the resulting adopted subarea plan also provides discrete capital facilities plans for public and private infrastructure phasing and funding that address both current area needs as well as concurrency standards associated with new development. Once a local government has

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concluded this process to engage the public in broad community planning issues, the site-specific, individual objectives of the property owners or development interests can be addressed through the development permit application and approval process based on the subarea plan. Presuming that the development interests have participated in the subarea planning process, their understanding of the outcome should inform their internal planning and therefore enable them to formulate their plans with few iterations. Consequently, subarea planning typically reduces or eliminates much of the uncertainty of proceeding with development proposals, and the permitting agency should be able to expedite the permit process since the decision standards and criteria have been established in direct anticipation of the type of land use and development proposed.

As I testified previously, when the subarea planning process and the permitting process are combined, it is difficult to see how an applicant could get clear direction from the jurisdiction regarding the required format and substance of the application and how to address the approval standards and criteria when those standards and criteria have not yet emerged from the planning process. A subarea plan itself should establish fundamental planning concepts, goals and polices which are typically intended to reconcile with existing comprehensive plan goals and policies, and which typically provide legislative or policy guidance for future development permit applicants. As I testified previously, it is antithetical to the purpose of linking project-level implementation with comprehensive planning to combine these processes together. Such a combined process leads to confusion and contradiction.

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I have carefully reviewed the hearing transcript. As further discussed below, Kittitas County appears to have addressed the inevitable conflicts and confusion in the process by discarding any effort to engage in a meaningful subarea planning process, and simply disregarded important local Comprehensive Plan policies, focusing instead on one dominant issue – the "setback" distance between turbines and residences in the vicinity of the project. This focus is primarily through review of the development agreement. In fact, the denial is fundamentally based on failure to come to terms on an "agreed" development agreement. I find no meaningful discussion in the hearing record, showing how the County attempted to apply or reconcile its GMA Comprehensive Plan policies or applicable zoning criteria to the review of the KV Project. This failure to appropriately apply the County's own requirements resulted in a protracted hearing process without meaningful criteria, and without any meaningful effort to reconcile the project denial with the County's rural and natural resource Comprehensive Plan policies, including policies that support continued economic resource uses rather than residential development that tends to create conflict with the goals of the Rural Element. It appears to me from the record that the County has used the subarea planning and re-zoning processes to justify unsubstantiated discretion leading to the long list of findings in the denial, when in fact, the ultimate decision was no more than an imposition of project-level setback requirements lacking objective analysis. This ignored the merits of the other parts of the mandated approval process.

Q Please state your opinion regarding the County's finding that the KV Project is not compatible with the "neighborhood."

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A. The record of the County's review of the Comprehensive Plan subarea amendment is replete with the use of the terms "community" and "neighborhood". These are undefined terms in the Comprehensive Plan and KCC as well as in the GMA and other state statutes. Therefore, there is no general consensus about the characteristics that differentiate subareas from communities from neighborhoods. From a planning perspective, the term "neighborhood" implies some form of integrated community, with a common character, design, within a geographic area established by some physical features or other environmental characteristics, not a sparsely populated rural area with homes scattered in an unplanned form over many square miles. In fact, most residents in the area have constructed separate access roads to their properties, even when shared roads would appear to have been more cost-effective and "neighborly", resulting in what appears to avoid the semblance of a "neighborhood" setting. From my perspective, it is difficult to envision a large area such as the 6,000 acre Kittitas Valley Wind Farm subarea and the surrounding area as a "neighborhood" as it was described by the BOCC in their final decision (Finding #27). In comparison, the land area of Cle Elum and South Cle Elum is 2,240 acres with a population of 2,370. While there are residences near the proposed subarea boundaries, the proposed "subarea" itself appears to have only two residences and a total of 13 property owners, all participating with, and supporting the project. Since the subarea was defined by the applicant, and the most significant groupings of nearby residences to the north and south are separated by at least 3 miles, based on my experience in how these terms are traditionally applied in the planning and permitting context, I question whether "incompatibility with the neighborhood" is a valid finding of the County's review.

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Q Please comment on the County's use of SEPA as a basis to deny the project.

A Finding #27 and a number of other findings assert that the applicant has not shown how the "significant adverse" impacts of the proposed wind farm can be adequately mitigated. KCC 17.61A.040 (1) states: " . . .the board of county commissioners must set forth the development standards applicable to the development of the specific wind farm, which may include, but are not limited to: . . .b. Mitigation measures and such other development conditions as deemed to protect the best interests of the surrounding property or neighborhood or the county as a whole . . ." The mitigation that emerged during the review process and is articulated in Finding #40 is "The Board finds that a minimum of 2500 feet separation from wind turbines and non-participating landowners' residences would be necessary to reduce the significant adverse impact rating of 'high' down to moderate visual impacts for those residences". This latter finding departs from the notion of a "neighborhood impact" to single out the individual visual impacts on the non-participating residents. While I cannot speak to the Board's conclusion of the implied relationship between "high" and "significant" visual and shadow flicker impacts, the denial appears to paint the project with an overly broad brush in its assumption that impacts on a few non-participating residents constitute a "neighborhood" impact, and therefore is an adequate test of significance under SEPA. Since EFSEC is the responsible official for environmental review in this case, it seems to me that the Board should have included an analysis of the EFSEC SEPA record in reaching this conclusion, and that this determination is more appropriately one for EFSEC to make.

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Q The County indicates that the Project is not compatible with the "rural residential and agricultural mixed use" character of the area. Are these concepts consistent with the County land use planning and zoning?

A No. Finding #39 states that "This area of the county has the character of rural residential and agricultural mixed use. The introduction of turbines of this size and number to this area is incompatible in such close proximity to the current uses." This area of the County is not planned or zoned for "rural residential" or "agricultural mixed use." Moreover, the area is sparsely populated, with the vast majority of acres in the vicinity devoted to rural and natural resource use, not to residential use. Finding #39 is in conflict with the adopted zoning for the area which is divided between A-20 (Agriculture) and F-R (Forest and Range). These two zones have extensive lists of outright permitted uses such as mining, commercial greenhouses, **all** uses permitted in residential and suburban zones, airports, and gas and oil exploration and construction. It is difficult to understand how the proposed project is subject to a much higher standard of review and can be denied on the basis of visual impact, when many of these allowed uses could have more significant impacts on a much wider spectrum of the environment such as traffic, noise, dust, surface water quality, as well as aesthetics. Moreover, the predominant land use attributes are of a rural agricultural and natural resource area, not a residential area.

Q Please elaborate on your opinion, expressed above, regarding the relationship between the subarea plan process and the development agreement, and how these two decision processes were undertaken by the County.

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A Prior to the commencement of the hearings process, Horizon prepared and submitted extensive proposed findings to show how the project is consistent with, and in many instances, implements the County's GMA Comprehensive Plan and development regulations. Given that the applicant was required to apply for a subarea plan amendment and a rezone as part of the integrated approval process, the applicant appropriately assumed that these findings would be very important to achieve approval under the County's wind farm ordinance, and therefore would be addressed in the analysis leading up to the final decision.

The extensive hearings and deliberations of the Planning Commission and BOCC indicate the complexity of the process and the difficulty these two bodies had in arriving at their findings. For example, the Planning Commission debated the Comprehensive Plan subarea amendment, with several members asserting that the guidance for subarea plans was inadequate to result in an action that would be a true GMA comprehensive plan element. While the Planning Commission seemed confused about why a subarea plan amendment was required, they made no meaningful effort to apply the adopted planning policies and zoning code provisions which should have been considered in judging whether a subarea plan should be approved. While this was primarily a legislative matter that required review of the applicant's "Comprehensive Plan Amendment Docketing Form" dated September 5, 2005 that included analysis of the proposal's consistency with the adopted Comprehensive Plan goals, policies and objectives (GPOs), the February 13 Planning Commission report to the BOCC does not include any findings or conclusions regarding the subarea plan part of the proposal. Nor did the Planning Commission make any effort to address the applicant's proposed findings of consistency with County plan

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policies and zoning code provisions. In fact the Commission's rationale was that since the development proposal (rezone and development agreement) was incompatible with the Comprehensive Plan (even though the Plan amendment was not addressed), the project should be denied.

The BOCC followed the same process, and simply failed to address the subarea plan and rezone request, including the applicant's proposed findings of consistency. As indicated above, under typical planning models, the subarea plan and zoning issues should be decided as a precursor to making permit-level decisions, and certainly prior to considering a development agreement. That early decision is intended in large part to guide development, and to provide the applicant with appropriate criteria. Instead, the deliberation of the BOCC focused on the development agreement, to the complete exclusion of what should have been the most fundamental elements of the County's process (the subarea plan and zoning requirements). In so doing, the BOCC kept the applicant guessing until the final nights of the hearing regarding setbacks – an issue having a fundamental bearing on project design and feasibility.

The entire six-month hearing process was antithetical to the GMA and regulatory reform objectives of expediting development approvals through a single fact-finding open record hearing and a subsequent decision-making closed record hearing. The use of the joint Planning Commission and BOCC portion of the hearing further complicated this, leading to the convoluted public testimony and intermixed "deliberations" during the open record hearing, as shown in the transcripts. While I have frequently experienced the continuation of hearings over several sessions, I have never seen anything like this.

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Q At the end of the hearings process, the County contended that Horizon should propose a new layout or design, with turbines removed from the "outer" areas, and relocated closer to the "center" of the proposed subarea. Aside from potential issues related to feasibility of such a changed design, do you have an opinion regarding the effect such a late-change in the proposed layout and design would have on the public participation and hearing process?

A Typically, when a project is significantly changed prior to approval, the permitting government authority must, reopen the public record, re-notice the project and reconvene hearings, to receive public testimony. That is because when the hearing notice is first issued, the public is informed about the characteristics of the proposed project as initially proposed, and is therefore able to provide testimony and information regarding that proposal. Typically, environmental analysis is conducted related to the initially-proposed project layout. While I cannot comment regarding whether additional environmental studies would have been required, based on the way Kittitas County conducted this process, the applicant should reasonably expect that the County would have been obligated to re-notice, and potentially recommence the hearing process. This may have required a new hearing before the Planning Commission as well as the BOCC. Clearly, given the duration and complexity of the County's process, the outcome of such a new process would be uncertain, and the time required to reach the "decision point" with the BOCC would likely have been many months.

Q Please comment on the County's reliance on the development agreement as the rationale to deny the project.

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A RCW 36.70B.170 states: "A development agreement shall be consistent with the applicable development regulations adopted by the local government planning under chapter 36.70A RCW." Finding # 35 states "The development agreement proposed by the applicant is deficient in multiple respects and would require many modifications to (sic) in form and substance before it would be acceptable for approval as a development agreement. (Note that per Finding #35, the application including the proposed development agreement was determined complete). In my experience, development agreements between local governments and project proponents are the last step of the permitting process for good reason. This allows the entire record of review including the complete application, SEPA review, public comment, and official hearings and decision bodies to inform the final outcome of the approval and any necessary conditions such as impact mitigations, fees, bonding, etc. It is very difficult to understand how the BOCC determined that the development agreement was "deficient" when it was supposed to be based on the "applicable adopted development regulations" and when the finding of "deficiency" was not addressed at the time the application was deemed complete.

In this setting, an applicant typically relies on discussions and negotiation with agency staff and government legal counsel to work out the terms of the agreement and mitigation measures, with staff acting with explicitly delegated authority from the governing body. Typically, staff will the present the "negotiated draft" development agreement to the decision-maker, with staff's recommendation of approval. In short, for a development agreement process to be successful, an essential step is for professionals to work together to develop an agreement that can be submitted to the governing body with a

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recommendation of approval. From the record, it does not appear that the BOCC ever delegated authority to the staff, and County staff clearly did not work with the applicant to craft an agreement meeting BOCC requirements. And, staff certainly did not recommend approval to the BOCC, or offer any findings or conclusions regarding the applicant's proposal.

Therefore, the County's process was not a true "negotiation" process leading to a development agreement, in my experience. The BOCC, Planning Commission, and staff were supposed to deal with the combined subarea plan, rezone, development agreement, and development permit in one "package", with the BOCC responsible for being the ultimate legislative and regulatory decision-maker following objective technical staff review and Planning Commission analysis. In this setting, the outcome was a denial based on a finding derived in a previously undisclosed regulatory requirement ("minimum 2500 foot setback") and the applicant was denied a meaningful opportunity to respond. This appears to me to be inconsistent with the intent of the entire adopted wind farm approval procedure. Any applicant would reasonably expect that this setback constituted a regulatory "requirement," in contrast to an "opening offer" in a "negotiation" process. Moreover, it would appear that even if the BOCC had agreed to consider some modification of the imposed setback requirement, that "changed" requirement, and the changed development agreement, would require yet more public hearings, with no ability for the applicant to have a true "seat at the table" with a fair expectation of a workable outcome and still facing a very high probability of eventual denial, after potential months of additional hearings. I have never seen such a "negotiation" in a public hearing setting, and it seems to me that an applicant would be

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placed in serious jeopardy in attempting to freely exchange information (considered "new" in a public hearing setting), make counter offers, put various ideas and concessions "on the table" for discussion, and offer potentially confidential data and information, to persuade the other "negotiating" party.

Q The BOCC denied the application both under the wind farm ordinance and under the County's rezone requirements. Do you have an opinion regarding the appropriateness of the BOCC's decision to apply the rezone ordinance in this setting?

A The County adopted the wind farm ordinance with the intent of establishing a "unified" decision process. The ordinance purports to establish criteria for consideration of the subarea plan and rezone. In my opinion, it is "double jeopardy" to then also impose the rezone criteria, found in KCC 17.98. It appears to me, from the record, that the County's use of this process resulted in an impossibly complex set of impediments for the applicant, the staff, and the Planning Commission to navigate successfully.

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